



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R02-OAR-2016-0320; FRL-9951-49-Region 2]

Partial Approval and Partial Disapproval of Air Quality Implementation Plans; New York; Interstate Transport Infrastructure SIP Requirements for the 2008 Ozone NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is partially approving and partially disapproving elements of a New York State Implementation Plan (SIP) submittal pertaining to the infrastructure requirements of section 110 of the Clean Air Act (CAA) for the 2008 ozone National Ambient Air Quality Standard (NAAQS). The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA. This action pertains specifically to infrastructure requirements concerning interstate transport provisions.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R02-OAR-2016-0320. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either

electronically through <http://www.regulations.gov> or please contact the person identified in the "For Further Information Contact" section for additional information.

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SUPPLEMENTARY INFORMATION: Throughout this document, "we", "us", and "our" means EPA.

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I. Background

This rulemaking addresses CAA section 110(a)(2)(D)(i) requirements in New York's infrastructure SIP submitted on April 4, 2013 to address applicable infrastructure requirements with respect to the 2008 ozone NAAQS.

The requirement for states to make a SIP submission of this type arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)," and these SIP submissions are to provide for the "implementation, maintenance, and enforcement" of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA's taking any action other than promulgating a new or revised NAAQS. Section 110(a)(2) includes a list of specific elements that "[e]ach such plan" submission must address. EPA commonly refers to such state plans as "infrastructure SIPs." In

particular, section 110(a)(2)(D)(i)(I) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS (commonly referred to as prong 1), or interfering with maintenance of the NAAQS (prong 2), in any another state. Section 110(a)(2)(D)(i)(II) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from interfering with measures required to prevent significant deterioration (PSD) of air quality (prong 3) and to protect visibility (prong 4) in another state. This rulemaking addresses prongs 1, 2, and 4 of CAA section 110(a)(2)(D)(i). EPA will address the other portions of the April 4, 2013 infrastructure SIP submittal, including prong 3 pertaining to CAA section 110(a)(2)(D)(i)(II), in another action.

II. What action did EPA propose on the SIP submission?

The proposed rulemaking associated with this final action was published on June 21, 2016 (81 FR 40229). In that action, EPA proposed to disapprove the portions of New York's April 4, 2013 SIP submission addressing prongs 1 and 2, and proposed to approve prong 4 regarding CAA section 110(a)(2)(D)(i) requirements.

In proposing to disapprove the SIP submission as to prongs 1 and 2, EPA noted several deficiencies in New York's submission: (1) New York's own modeling showed "predicted" nonattainment in the bordering states of Connecticut, New Jersey, and Pennsylvania, but did not adequately explain its conclusion that New York emissions will not significantly contribute to those predicted exceedances; (2) the emissions reductions cited in New York's submission were based on preliminary emissions estimates, and were below the assumed emissions reductions that were used in New York's cited preliminary screening modeling performed for the Ozone Transport Commission; (3) the submission used a projection year (2020) to model downwind air

quality that is two years beyond the July 11, 2018 moderate area attainment date for the 2008 ozone NAAQS; (4) the submission failed to address prong 2, the State's potential interference with maintenance of the 2008 ozone NAAQS in other states; (5) the submission did not demonstrate that the emission rates at which Electric Generating Units (EGUs) in the state operated were the result of enforceable emission limits or other mandatory programs such that the emission rate would not increase; (6) New York's submission relied on the state's implementation of the Clean Air Interstate Rule (CAIR), which was not designed to address interstate transport with respect to the 2008 ozone standard and is no longer being implemented by the states and EPA; and (7) EPA recently released technical data that contradicts the State's conclusion that its SIP already contains adequate provisions to meet interstate transport requirements with respect to the 2008 ozone NAAQS.

In proposing to approve the New York SIP submission with respect to the prong 4 visibility transport requirements under CAA section 110(a)(2)(i)(II), EPA explained that New York's SIP submission relied on the State's approved Regional Haze SIP to ensure that emissions from sources within the State were not interfering with measures to protect visibility in other states.

III. What comments did EPA receive in response to its proposal?

We received comments during the public comment period on our proposed action from the New York State Department of Environmental Conservation (NYSDEC), the State of Connecticut Department of Energy and Environmental Protection (DEEP), and the Environmental Energy Alliance of New York, LLC (the Alliance). A synopsis of the comments and our responses are below.

Comment 1: The NYSDEC stated that EPA is proposing to replace New York's "supposedly deficient" plan with a partial remedy that controls fewer units at less stringency. NYSDEC further states that EPA is proposing to disapprove a plan based in part on a NO_x regulation that covers EGUs as well as non-EGU source categories at a \$5,000 per ton control cost threshold, and replace it with a program that covers only EGUs at a \$1,300 per ton control cost threshold. NYSDEC also states that EPA should explain how its proposed transport rule addresses transport more effectively than New York's plan.

Response 1: As noted above, we identified a number of deficiencies with New York's SIP submission to support the proposed disapproval of the plan as to prongs 1 and 2 with respect to the 2008 ozone NAAQS. While EPA cited the modeling conducted for EPA's proposed Cross State Air Pollution Rule Update for the 2008 ozone standard (CSAPR Update), 80 FR 75706 (December 3, 2015), as additional evidence that emissions from New York may significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in other states, this action did not propose and does not finalize any remedy to address the deficiency identified in New York's SIP submission. This action does not itself replace New York's plan with the proposed remedy that was included in the CSAPR Update proposal or any other remedy. Rather, with respect to prongs 1 and 2, this action disapproves New York's submission for its failure to provide sufficient analysis to support its conclusion that the state's SIP contains adequate provisions prohibiting emissions which interfere with air quality in other states.

NYSDEC misstates the burden imposed upon the EPA in reviewing this action. In submitting an infrastructure SIP, the state's burden is to demonstrate to EPA's satisfaction that it has complied with the statutory requirements of CAA section 110(a)(2). EPA's role in reviewing infrastructure SIP submissions is to ensure that the state's plan complies with the statute. With

respect to prongs 1 and 2, the EPA has reviewed New York's demonstration and determined, for the reasons summarized above, that it does not adequately demonstrate that the state's plan is sufficient to ensure that emissions from the state will not significantly contribute to nonattainment or interfere with maintenance. As noted below, this disapproval will trigger a federal implementation plan (FIP) clock which will require the EPA to promulgate a plan to prohibit those levels of emissions that impact downwind air quality in violation of the statute. However, the EPA is not required to provide that metric at the time it reviews the state's demonstration.

Moreover, EPA's 2011 modeling baseline used for evaluating interstate transport with respect to the 2008 ozone NAAQS accounted for the emission reductions from controls listed in the SIP—including New York's Reasonably Available Control Technology (RACT) rules—and nonetheless continued to show that New York would contribute to downwind air quality problems. Despite the considerable emission reductions achieved by New York, EPA's technical analysis for the CSAPR Update proposal demonstrates that New York's emissions still have an impact on other states.

Comment 2: The NYSDEC agreed that emissions in New York contribute significantly to nonattainment or interfere with maintenance in downwind areas. However, NYSDEC states that EPA should review New York's control program relative to what EPA might determine to be an approvable remedy rather than basing its disapproval on NYSDEC's emission reduction estimates and the fact that New York did not quantify its significant contribution.

Response 2: In this action, EPA is rightly focused on the discrete question of whether New York has demonstrated that its SIP contains adequate provisions to prohibit significant contribution to nonattainment and interference with maintenance of the 2008 ozone NAAQS in

downwind states. New York acknowledges in its comment, and EPA agrees, that New York's SIP submission does not currently satisfy those requirements. As such, EPA must disapprove New York's SIP submission for failing to satisfy the statutory requirements of CAA section 110(a)(2)(D)(i)(I). As explained in our June 21, 2016 proposal, and summarized above, New York has not demonstrated that its SIP contains adequate provisions to address interstate transport as to the 2008 ozone standard. Furthermore, despite recent emission reductions achieved by New York, in EPA's technical analysis for the proposed CSAPR Update, our modeling shows that New York contributes well above the air quality threshold of 1 percent of the 2008 ozone NAAQS (0.75 parts per billion) to several projected downwind nonattainment or maintenance receptors. As indicated in our proposal, EPA's modeling shows that New York contributes 16.96 ppb to downwind receptors in Connecticut, and 17.21 ppb to downwind maintenance receptors in Connecticut and New Jersey, both of which greatly exceed the threshold contribution levels.

Comment 3: The NYSDEC stated that EPA did not provide states with a clear indication of what was required for their respective transport SIPs at the time they were due. Without this information about cross-state contributions, NYSDEC relied on control measures already in place within the state.

Response 3: States have an independent responsibility to demonstrate that their plans contain adequate provisions to address the statutory interstate transport provisions, specifically to demonstrate that the plan properly prohibits emissions that will significantly contribute to nonattainment or interfere with maintenance of the NAAQS in downwind states. As the Supreme Court clearly held in *EPA v. EME Homer City Generation, L.P.*, “nothing in the statute places the EPA under an obligation to provide specific metrics to States before they undertake to fulfill

their good neighbor obligations.” 134 S. Ct. 1584, 1601 (2014).¹ Simply put, the CAA does not require EPA to quantify states’ good neighbor obligations before acting on their SIP submissions. Nevertheless, EPA did provide information to assist states with developing or supplementing their SIP submittal for the 2008 ozone NAAQS. On January 22, 2015, we issued a memorandum providing preliminary modeling information regarding potential downwind air quality problems and levels of upwind state contributions. *See* Memorandum from Stephen D. Page to Regional Air Division Directors, Regions 1-10, “Information on the Interstate Transport ‘Good Neighbor’ Provision for the 2008 Ozone [NAAQS] under [CAA] Section 110(a)(2)(D)(i)(I)”, January 22, 2015.”² As we noted in our CSAPR Update proposal, the EPA also provided updated modeling and contribution information in its August 4, 2015 NODA. (80 FR 46271). All of these documents consistently indicated that the EPA’s technical analysis showed that New York emissions contribute to downwind air quality problems with respect to the 2008 ozone NAAQS, yet New York did not revise or supplement its SIP submittal with additional data demonstrating that the state had satisfied its statutory obligation.

Comment 4: NYSDEC states that EPA’s failure to implement a full remedy leaves states unsure how to satisfy their transport obligations in regard to the 2008 ozone NAAQS. NYSDEC asserts that EPA should propose a subsequent update to CSAPR by June 2017 that encompasses a full remedy. NYSDEC states that the update should include requirements for large non-EGU sources and utilize a control cost threshold that is more equitable to states.

¹ “Nothing in the Act differentiates the Good Neighbor Provision from the several other matters a State must address in its SIP. Rather, the statute speaks without reservation: Once a NAAQS has been issued, a State ‘shall’ propose a SIP within three years, §7410(a)(1), and that SIP ‘shall’ include, among other components, provisions adequate to satisfy the Good Neighbor Provision, §7410(a)(2).” *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. at 1601.

² Available at <https://www.epa.gov/sites/production/files/2015-11/documents/goodneighborprovision2008naaqs.pdf>.

Response 4: For the reasons stated above, this comment is outside of the scope of this action. EPA will address comments regarding the adequacy of the proposed FIP in the final CSAPR Update rule.

Comment 5: Connecticut DEEP is supportive of the proposed disapproval of New York's SIP submission regarding prongs 1 and 2. DEEP notes that New York and Connecticut have partnered for over 40 years to provide clean air, especially in the southwest portion of Connecticut and the New York City metropolitan region, and will continue this collaboration. DEEP encourages EPA to describe, with as much specificity as possible, the steps states should take to meet their good neighbor responsibilities under the Clean Air Act. DEEP also urges EPA to immediately propose and finalize a full transport remedy for the 2008 ozone NAAQS rather than allowing compliance efforts for the 2015 NAAQS to drive compliance with the 2008 NAAQS.

Response 5: EPA is supportive of the states' collaborative efforts to improve air quality. This action is focused on EPA's review of New York's infrastructure SIP submission addressing prongs 1 and 2 of CAA section 110(a)(2)(D)(i) submitted for the 2008 ozone NAAQS. As noted earlier, while the EPA is not obligated to quantify state's emission reduction obligations prior to or as part of reviewing a state's SIP submission, we have provided data informative to the state's development and EPA's review of SIPs addressing these requirements with respect to the 2008 ozone NAAQS. EPA will further address state's emission reduction obligations in the rulemaking to finalize the CSAPR Update rule.

Comment 6: The Alliance requested extension of the public comment period for the proposal to coincide with the comment period for a proposed consent decree "requiring the EPA

to reject the SIP" to address a lawsuit filed by the Sierra Club in the United States District Court for the Northern District of California.³

Response 6: We disagree that an extension of the public comment period is warranted for this action. The commenter does not provide an adequate justification why an extension is necessary. The proposed consent decree only concerns a proposed deadline by which EPA would have to act on the state's SIP submissions under CAA section 110(k)—not the substance of that action. *See* 81 FR 42351 (June 29, 2016). In contrast, the June 21, 2016 proposed disapproval sought comment on a substantive action—*i.e.*, whether to approve or disapprove New York's submission, and on what basis.

Comment 7: The Alliance asserts that the proposed disapproval of New York's transport SIP, the proposed consent decree mentioned in *comment 6*, and the CSAPR Update rule are all related and should be resolved at the same time. The Alliance states that they are concerned that one of the actions may be settled without consideration of comments associated with the other actions, and that the resulting plans for attainment may not be as cost effective, "reduction efficient" or may not significantly impact attainment. By way of example, the Alliance notes that it provided comments on the proposed CSAPR Update rule regarding errors in EPA's supporting modeling. The Alliance contends that without finalizing the CSAPR Update rule, neither the EPA nor the commenting public is able to fully evaluate the legitimacy of the SIP disapproval. The Alliance further states that in as much as the proposed consent decree is intended to effectuate SIP disapproval, finalization of the consent decree is unwarranted until the full assessment of public input to the CSAPR Update rule is completed and finalized.

³ *See Sierra Club v. Gina McCarthy*, No. 3:15-cv-04328-JD (N.D. Cal.).

Response 7: EPA disagrees that the proposed disapproval of New York's transport SIP, the proposed consent decree mentioned in *comment 6*, or the CSAPR Update rule should be resolved at the same time. CAA section 110(k)(2) requires EPA to act on a state's SIP submission within one year after the submission is determined to be complete. As indicated in the response to *comment 6*, the proposed consent decree with the Sierra Club governs only the timetable on which EPA would be required to act on the state's SIP submissions under CAA section 110(k)(2)—not the substance of EPA's action.

As described in the proposal and earlier in this document, EPA has identified several ways in which New York's SIP submission was deficient for purposes of addressing the state's obligation pursuant to CAA section 110(a)(2)(D)(i)(I). In particular, EPA proposed to disapprove New York's SIP submission because the State's modeling showed "predicted" nonattainment in other nearby states with existing measures; the submission did not demonstrate that the emission rates at which EGUs operated were the result of enforceable emission limits; the submission failed to address the State's potential interference with maintenance (or prong 2 of section 110(a)(2)(D)(i)); and the submission relied on the state's implementation of CAIR, a rule that is no longer being implemented by the states and EPA and that was declared invalid by the D.C. Circuit.

While EPA cited the modeling conducted for the proposed CSAPR Update rule as additional evidence that New York may significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in downwind states, we did not propose to make a specific finding of contribution or to quantify any specific emissions reduction obligations. Rather, the evaluation of whether emissions from the State significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone NAAQS downwind, and if so

what reductions are necessary to address that contribution, is being conducted in the context of the CSAPR Update rulemaking. Accordingly, EPA is considering submitted comments regarding EPA's air quality modeling and various associated legal and policy decisions in finalizing that rulemaking.

EPA notes that the technical data discussed at proposal with respect to New York's potential contribution to downwind air quality problems is consistent with modeling previously conducted for trading programs addressing interstate ozone transport such as CSAPR (76 FR 48208), CAIR (70 FR 25162), and the NO_x SIP Call (63 FR 57356), indicating that New York is frequently linked to downwind receptors. The modeling conducted to support the proposed CSAPR Update is the most recent technical information available to the Agency which still shows such linkages to downwind receptors. Even absent this modeling data, New York's SIP submission is inadequate to demonstrate compliance with prongs 1 and 2 of CAA section 110(a)(2)(D)(i) with respect to the 2008 ozone NAAQS.

Comment 8: The Alliance commented that, under 110(a)(2)(D)(i)(I), SIP control requirements should apply to a source category or a reasonable aggregation of emissions. The Alliance further stated that under the CSAPR Update rule, EPA unreasonably concluded that the New York electric generating unit sector budget—and only that budget—had to be revised to address significant nonattainment. The Alliance contends that the New York EGU sector emissions are not a significant contributor to neighboring state nonattainment or maintenance issues, and if EPA finalizes the SIP disapproval and finalizes the CSAPR Update rule as proposed, another round of emission reductions from the New York EGU sector will not provide any significant improvement in air quality. The Alliance concludes that it is not appropriate to consider additional reductions from EGUs until reductions are found in other sectors.

Response 8: As described in the proposal and earlier in this document, EPA has identified several ways in which New York's SIP fails to address the prongs 1 and 2 requirements of CAA section 110(a)(2)(D)(i)(I). This action did not propose and does not finalize any remedy to address the deficiency identified in New York's SIP submission. Rather, with respect to prongs 1 and 2, this action disapproves New York's submission for its failure to provide sufficient analysis to support its conclusion that the state's SIP contains adequate provisions to meet interstate transport requirements with respect to the 2008 ozone NAAQS. The evaluation of the emission reductions necessary to address the State's significant contribution, including from which sectors such reductions might be achieved, is outside the scope of this rulemaking, and is being conducted in the context of the CSAPR Update rulemaking.

Comment 9: The Alliance cited comments submitted to the docket of the CSAPR Update rulemaking that identified alleged technical deficiencies in EPA's modeling. The Alliance states that EPA should run its modeling using the Integrated Planning Model (IPM) 5.15 base case, and correct for other technical errors in CSAPR modeling. The Alliance questioned the CSAPR Update rule's conclusion of state linkages to downwind nonattainment (and therefore the validity of EPA's proposed disapproval), and the expenditure of significant state and EGU resources on developing revised SIPs and modifying controls based on an outdated modeling platform. The Alliance also states that regulated entities are not being given appropriate notice and opportunity to comment on the SIP disapproval when EPA has not yet completed modeling for the final CSAPR Update rule. The Alliance concludes that the correction of errors will demonstrate that the CSAPR Update rule, which EPA is relying on to disapprove New York's SIP, results in over-control.

Response 9: As noted earlier in this document, EPA will consider timely submitted comments regarding EPA's air quality modeling, the modeling platform, and state linkages to downwind nonattainment for the CSAPR Update in the context of that rulemaking, not this one.

With respect to this rulemaking, EPA disagrees with the commenter that we are only relying on CSAPR modeling to disapprove the State's SIP. As we have previously noted, EPA has identified several ways in which New York's SIP submission is deficient for purposes of addressing the State's obligations under CAA section 110(a)(2)(D)(i)(I). While EPA cited the modeling conducted for the CSAPR Update as additional evidence that New York may significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in downwind states, we did not propose to make a specific finding of contribution or to quantify any specific emissions reduction obligations. Rather, EPA is conducting its evaluation of whether emissions from the State significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone NAAQS downwind and, if so, what reductions are necessary to address that contribution, in the context of the CSAPR Update rulemaking.

EPA therefore disagrees with the commenter that appropriate notice and comment to regulated entities on the proposed SIP disapproval has not been provided since the CSAPR Update modeling has not been finalized. EPA provided a 30 day comment period on the proposed disapproval (see 81 FR 40229). EPA has also provided appropriate public notice and comment for the CSAPR Update rule (see 80 FR 75706). Moreover, there are no regulated entities under this action as this action merely disapproves the portion of New York's SIP addressing CAA section 110(a)(2)(D)(i)(I), and does not itself create any new requirements.

Comment 10: The Alliance commented that EPA should have performed refined screening modeling to determine all the factors driving ozone exceedances in New York and Connecticut. The Alliance further states that failure to do so could unnecessarily require further reductions in New York, not resolve the ozone nonattainment problem, and unnecessarily lead to the disapproval of New York's SIP.

Response 10: As discussed above, this action did not propose and does not finalize any remedy to address the deficiency identified in New York's SIP submission. Rather, with respect to prongs 1 and 2, this action disapproves New York's submission for its failure to provide sufficient analysis to support its conclusion that the state's SIP contains adequate provisions to meet interstate transport requirements with respect to the 2008 ozone NAAQS. The degree to which additional emission reductions may be necessary to address the requirements of section 110(a)(2)(D)(i)(I) with respect to the 2008 ozone NAAQS will be evaluated in a separate rulemaking.

Comment 11: The Alliance submitted analyses regarding NO_x emission trends in New York showing declining NO_x emissions and emission rates, and operational data from 2007 to 2015 for annual NO_x emissions, NO_x ozone season emissions, NO_x peak day emissions, and NO_x emissions on ozone exceedance days. The Alliance commented that New York's "higher level of assumed reductions" is more conservative than the actual data reveal and that New York's modeling assumptions should be honored by EPA. The Alliance indicates that EPA's SIP disapproval is based on New York's modeling using higher levels of assumed emission reductions, assuming 48% NO_x reductions and 30% VOC reductions without demonstrating how it will achieve those higher levels of emission reductions. The Alliance further indicated that the data they submitted shows that between 2007 and 2015, two years before the New York

modeling year, annual NOx emissions decreased 64%, ozone season NOx emissions decreased 56%, peak ozone season emission day NOx emissions decreased 40%, and the average NOx emission reduction on those days when ozone exceedances were observed at eight New York ozone monitoring sites ranged from 47% to 63% and the NOx emission reduction at the Fairfield, Connecticut ozone monitoring site was 38%. The Alliance further stated that both the EPA and NYSDEC modeling used annual or ozone season emissions for their projections and in both instances the observed reductions from 2007 to 2015 are greater than the reductions used by NYSDEC. The Alliance concludes that the EPA basis for the SIP disapproval is incorrect.

The Alliance also notes that EPA claimed that New York did not demonstrate that the emission rates at which EGUs operated in the state are the result of enforceable emission limits or other mandatory programs such that the emission rate will not increase. The Alliance notes that the NOx emission trends show a marked decrease in 2014 when New York's revised RACT limits become effective, resulting in an annual NOx rate decrease of 52% and an ozone season rate decrease of 42%. The Alliance states that the comparison of daily NOx emissions from 2007 to 2015 shows that New York's revised NOx RACT limits did have an enforceable impact. The Alliance also notes that coupled with the number of recent retirements at other New York facilities, it is extremely unlikely that NOx emission rates could increase substantially.

Response 11: EPA agrees with the commenter that NOx emissions and emission rates in New York have been trending downward since 2007. EPA also agrees that due to New York's stringent 2014 RACT emission limits—which EPA approved into the SIP and, as such, are federally enforceable—there are enforceable limits on NOx emissions from EGUs and other large boilers regulated under New York's RACT rules. New York's RACT rules also make it

unlikely that emission rates from those sources will increase above the levels permitted by the emissions limits.

As an initial matter, EPA notes that the Alliance based its analysis only on a subset of New York's emissions data (from EPA's Clean Air Markets database), whereas New York's modeling was based on a much larger emission inventory (projected 328,457 tons of NOx emissions, and 368,784 tons of VOC emissions from overall state emissions in 2020).

Most importantly, EPA notes that New York's RACT rules were factored into New York's modeling as well as EPA's base case modeling. Despite emission reductions from New York's RACT regulations, as noted previously in this document, EPA modeling still shows a very large contribution to downwind nonattainment and maintenance receptors from New York (i.e., over twenty times the threshold contribution). New York's modeling also showed nonattainment problems in nearby states. Thus, New York has not demonstrated that its RACT rules are sufficient to address the state's significant contribution to nonattainment and interference with maintenance of the 2008 ozone NAAQS in other states.

Comment 12: The Alliance submitted analyses showing the correlation between New York NOx emissions and observed daily maximum ozone concentrations on ozone exceedance days. The Alliance commented, "While these analyses confirm that there is a relationship [between ozone concentrations in Fairfield, Connecticut and New York EGU NOx emissions] they also indicate that EPA and NYSDEC should address the trend toward a weaker relationship noted in the difference between 2007 and 2015." The Alliance further stated, "[I]t is obvious that the relationship between [New York] emissions and downwind ozone is complicated, not solely related to [New York] EGU emissions and must be evaluated in better detail before the EPA unilaterally rejects the New York's [sic] SIP."

Response 12: EPA agrees that there is a relationship between New York EGU NO_x emissions and ozone concentrations in Fairfield, Connecticut. This relationship supports EPA's finding that reductions in New York EGU NO_x emissions are needed to help lower ozone concentrations in Fairfield, Connecticut and at other downwind nonattainment and maintenance sites in Connecticut to which New York is linked. Ozone concentrations in Fairfield, Connecticut are dependent upon a number of factors including NO_x emissions from EGUs and other upwind sources of NO_x and VOC emissions, as well as local emissions in Connecticut. Inter-annual variability in meteorology is a principal factor in determining year-to-year differences in the magnitude of ozone concentrations. In this respect, the fact that the relationship between New York EGU NO_x emissions and ozone in Fairfield, Connecticut is different in 2007 compared to 2015 does not disprove the contributions of New York EGU NO_x emissions to high ozone concentrations in Fairfield, Connecticut.

IV. What action is EPA taking?

EPA is disapproving a portion of the April 4, 2013 SIP submittal from New York pertaining to the requirements of CAA section 110(a)(2)(D)(i)(I) regarding interstate transport of air pollution that will significantly contribute to nonattainment or interference with maintenance of the 2008 ozone NAAQS in other states, known as prongs 1 and 2 of the good neighbor provision.

EPA is approving the portion of the April 4, 2013 SIP submittal from New York pertaining to the requirements of CAA section 110(a)(2)(D)(i)(II) requirement for visibility (or prong 4).

We expect to take action on the other portions of New York's infrastructure SIP at a later date.

V. What are the consequences of a disapproved SIP?

Pursuant to CAA section 110(c)(1), this disapproval establishes a 2-year deadline for the EPA to promulgate a FIP for New York addressing the requirements of CAA section 110(a)(2)(D)(i)(I) with respect to the 2008 ozone NAAQS unless New York submits and we approve a SIP that meets these requirements. Disapproval does not start a mandatory sanctions clock for New York pursuant to CAA section 179 because this action does not pertain to a part D plan for nonattainment areas required under CAA section 110(a)(2)(I) or a SIP call pursuant to CAA section 110(k)(5).

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This final action is not a “significant regulatory action” under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and was therefore not submitted to the Office of Management and Budget for review.

B. Paperwork Reduction Act (PRA)

This final action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This rule does not impose any requirements or create impacts on small entities. This partial SIP approval and partial SIP disapproval under CAA

section 110 will not in-and-of itself create any new requirements but simply approves and disapproves certain state requirements for inclusion into the SIP.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action does not apply on any Indian reservation land, any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, or non-reservation areas of Indian country. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it merely partially approves and partially disapproves a SIP submittal from the State of New York.

H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations because it does not affect the level of protection provided to human health or the environment. This action merely partially approves and partially disapproves a SIP submittal from the State of New York.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

L. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Incorporation by reference, Nitrogen Dioxide, Ozone, Volatile organic compounds.

Authority: 42 U.S.C. 7401 et seq.

Dated: August 12, 2016.

Judith A. Enck,
Regional Administrator,
Region 2.

40 CFR part 52 is amended as follows:

PART 52-APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart HH – New York

2. Section 52.1670(e), is amended by adding an entry for “Section 110(a)(2) Infrastructure Requirements for the 2008 ozone NAAQS” at the end of the table to read as follows:

§52.1670 Identification of plan.

* * * * *

(e)***

EPA-APPROVED NEW YORK NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Action/SIP element	Applicable geographic or nonattainment area	New York submittal date	EPA approval date	Explanation
* * * * *				
Section 110(a)(2) Infrastructure Requirements for the 2008 ozone NAAQS.	Statewide	04/04/13	[Insert date of publication in the Federal Register] [Insert Federal Register citation]	This action addresses the following CAA element: 110(a)(2)(D(i)(II) prong 4.

3. Section 52.1683 is amended by adding paragraph (o) to read as follows:

§52.1683 Control strategy: Ozone.

* * * * *

(o) The portion of the SIP submitted on April 4, 2013 addressing Clean Air Act section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS is disapproved.

[FR Doc. 2016-20411 Filed: 8/25/2016 8:45 am; Publication Date: 8/26/2016]